Supreme Court, U. S.
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No. _____

In The Supreme Court of the United States

_____ TERM, 1977

_____ 76-1731

GEORGE RAYMOND DYBA,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari
to The United States Court of Appeals
For the Tenth Circuit

RALPH STEELE WRIGHT
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ATTORNEYS FOR PETITIONER

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1312

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the United
v.	)	States District Court
	)	for the Western District
GEORGE RAYMOND DYBA,	)	of Oklahoma
	)	(D.C. No. CR-73-81-B)
Defendant-Appellant.	)	

Ronny D. Pyle, Assistant United States Attorney (David L. Russell, United States Attorney, on the brief), for Plaintiff-Appellee.

Ralph Steele Wright, 300 North 25th Street, Billings, Montana, and Harry E. Claiborne, 108 South Third Street, Las Vegas, Nevada, for Defendant-Appellant.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from a judgment of conviction in which the defendant had been charged with burglary of a bank, contrary to 18 U.S.C. Section 2113 (a). The questions presented are:

First, whether the indictment contained insufficient allegations to apprise the defendant of the crime which was charged against him.

Second, whether statements made by the prosecution during final argument in which he commented on the failure of defendant to call witnesses constituted prejudicial error.

Third, whether the court erred in its comments to the jury given in connection with its so-called Allen charge; also, whether the timing of the Allen charge was itself prejudicial.

Fourth, whether as a matter of law the evidence was sufficient to sustain the verdict and whether the court erred in refusing to order disclosure of information in the government's file.

The facts are these. On January 29, 1973, a bank in Meeker, Oklahoma was burglarized. Three men entered the bank in the early morning hours. A barber who was in his shop across the street from the bank observed the three men. He notified the sheriff and other law enforcement officers. As a result, the effort of the three men was interrupted. Two of the three were apprehended at the scene.

Prentiss Newton Kirkland was seen by a sherriff's deputy running down an alley. The sheriff ordered him to stop. When Kirkland didn't, the deputy fired a shot which struck him.

In front of the bank, Theodore Paul Bates was seen jumping off the roof of the bank by a private citizen, who captured him.

A third man, allegedly the defendant herein, was captured by the sheriff who frisked him in search of a weapon. While the search was being carried out, the suspect jumped through an open door of the sheriff's automobile and drove away with the sheriff clinging to the side of the car. The sheriff fell from the vehicle but also fired a shot at close range at the burglar as the latter was driving away in the car. A slug was found in the dashboard of the car, the windshield was shattered, and there were three bloody napkins and a large quantity of blood inside the car.

The appellant was not apprehended for a period of two and one-half years after the burglary. The third man was described by the

sheriff, who said that Dyba resembled the man. Another witness, one John Buchanan saw the individual who the sheriff had apprehended while the former was in custody. He was able to view the side of the man's face. From this, he said that Dyba resembled the individual that he had seen.

Various material, including jackets, gloves, a walkie talkie, together with two bags of money were recovered. Evidence at the bank shows the means of entry to have involved the removal of a lock from the front door and the cutting of a hole in the vault door. There was a wrecking bar and other tools. A hose led from the bank's water supply to the safe. The safe had been filled with water prior to its being opened. This was so that the money would not be burned as a result of using the acetylene torch. The electrical wires had been cut.

The testimony of Kirkland was that he, together with Theodore Paul Bates and one Robert Krogness, had registered at a motel in Oklahoma City, seven or eight days before the bank burglary. They met Dyba at the Oklahoma City airport on January 28, 1973. All four drove to Meeker on the same evening. Krogness and Bates broke into a garage a block from the bank and carried away an oxygen tank and an acetylene torch. The stolen equipment was taken to the bank and Dyba and Kirkland entered it. Bates took a position on the roof and Krogness took his position outside of town. Dyba cut a hole in the top of the safe so that the money could be removed.

Dyba was not apprehended for some two and one-half years after the commission of the offense. He was discovered in Billings, Montana, his home. He was first tried in the United States District Court for the Western District of Montana on October 23, 1975. Due to the fact that the jury was unable to agree, a mistrial was declared. Very soon after this, on December 8, 1975, the case was tried a second time. After extensive deliberations, the jury found him guilty of Count I.

With regard to the effort on the part of the sheriff at Meeker, Oklahoma to arrest the person who was believed to be Dyba and the shooting which occurred incident to his escape, the evidence shows that although Dyba had a number of scars on his person, it was not certain from the appearance of these that any one of them was caused by a bullet wound.

Dyba offered evidence that on the day of the burglary he was in his home in Billings, Montana. He took the witness stand and testified to this, and also testified that he had never been shot. Medical evidence offered on his behalf was to the effect that the scars on his body were probably not caused by a gunshot.

I.

DID THE USE OF THE WORD "BURGLARY" IN THE INDICTMENT INSTEAD OF THE WORD "LARCENY" MISLEAD THE DEFENDANT OR FAIL TO APPRISE HIM AS TO THE NATURE OF THE CHARGE?

The allegedly defective indictment charged: burglary of monies in the care, custody, control or possession of said bank in violation of 18 U.S.C. Section 2113 (a). It correctly alleged the date, the place, the name of the bank, the entry of the bank. The deficiency is its failure to correctly describe the offense committed within the bank, namely larceny of monies. Instead it said burglary of monies. The statute prohibits the entry of a bank with intent to commit in such a bank "any felony affecting such bank or such savings and loan association in violation of any statute of the United States."

It seems clear that the entry was with intent to commit larceny of the monies in the care, custody, control and possession of the bank rather than burglary of the monies since the burglary is the unlawful entry. The government concedes that there cannot be a burglary of monies. At the same time, it maintains that the language serves to

notify the defendant that he was being charged with entering the bank with intent to steal the bank's money and that this was sufficient.

The thrust of the offense charged was unlawful entry. Use of the term "burglary" imported an unlawful entry with intent to steal since monies were mentioned. Also, the indictment alleged violation of Title 18 U.S.C. Section 2113 (a), which although it does not mention burglary, does say that whoever enters or attempts to enter any bank, etc., with intent to commit in such a bank any felony affecting such bank in violation of any statute of the United States, is guilty of a violation of said section.

A study of the indictment convinces us that it provided the accused with adequate notice of the offense charged.

Rule 52(a), F.R.Crim.P., furnishes an initial guide to resolving this issue. In speaking of harmless error it states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The cases also provide perspective. The opinion in Clay v. United States, 326 F.2d 196, 198 (10th Cir. 1963), *cert. denied*, 377 U.S. 1000, declares that "[t]he sufficiency of an indictment or information is to be determined by practical rather than technical considerations."

Robbins v. United States, 476 F.2d 26, 30 (10th Cir. 1973), stresses the importance of apprising the accused of the nature of the offense so that he may adequately prepare a defense. *See also* United States v. Mason, 440 F.2d 1293, 1296 (10th Cir. 1971). In *Mason* the defendants were charged with entering a building which was partly a savings and loan association with intent to commit larceny therein. The argument was that the word "therein" referred to the building generally and not to the part that was occupied by the credit union. This court conceded that the indictment was not a model of clarity, but it concluded nonetheless that it sufficiently described the elements

of the offense and apprised the accused that he was charged with entering a building with intent to commit larceny in a savings and loan association which occupied part of it.

U.S. v. Thompson, 356 F.2d 216 (2d Cir. 1965), was not dissimilar from this case on its facts. *Thompson* was a breaking and entering case also in which the defendant was accused of entering a bank with intent to commit a felony, the "taking of money." There was a failure to include the phrase "intent to steal." It was concluded by the Second Circuit that the defendant had not been prejudiced, for as in our case, the trial was carried out on the understanding that the felony affecting the bank referred to in the indictment was the offense specified in the statute, Section 2113.

We are not suggesting that this indictment is any model of good pleading. Nevertheless, it is easy to see how a typographical mistake such as is present here could happen. The only question we need consider is whether the defendant was prejudiced by it. Since it clearly identifies the transaction and also describes the offense sufficiently to apprise the accused of its nature, we conclude that it was legally sufficient.

II

WHETHER THE GIVING OF THE ALLEN CHARGE WAS PREJUDICIAL EITHER IN FORM OR DUE TO THE TIME WHEN IT WAS GIVEN

The jury started deliberations on December 10, 1975 and adjourned at 5:33 p.m. that day. Deliberations were resumed at 9:00 a.m. the next day, but at 11:17 a.m. report was made to the court that the jury was deadlocked. Then the court gave the so-called Allen charge which is claimed to have been coercive and prejudicial.

The emphasis in the controverted Allen charge given by the court was the importance of the case, expense involved in retrying it,

probability that there would not be better evidence presented to another jury, and a need for consultation consistent with exercise of their individual judgments.[1]

Appellate courts have regarded the Allen charge with concern and apprehension since its inception in Allen v. United States, 164 U.S. 492 (1896). The question is whether it was coercive so as to influence the jury to reach a particular verdict.

Although this court has been guarded about its use we have not disapproved it. *See, for example*, Berger v. United States, 62 F.2d 438 (1932), U.S. v Winn, 411 F.2d 415 (1969); U.S. v Wynn, 415 F.2d 135 (1969); Munroe v. U.S., 424 F.2d 243 (1970); U.S. v. Abbadessa, 470 F.2d 1333 (1972); and U.S. v. Smith, 521 F.2d 374 (1975).

The terms of the particular charge here given were not obnoxious. The question remains whether it is proper to give it after the jury has reported inability to reach a verdict. This was considered in United States v. Wynn, *supra*. There the court, while expressing disapproval of its use after the announcement of inability to agree, nevertheless refrained from a reversal in the case. It stated that it was a proper exercise of the court's power to guide the jury in reaching a fair and impartial verdict provided it made clear that the jurors were not to give up their conscientiously held convictions. U.S. v. Wynn, *supra*, at

1. One part of the charge considered by appellant to be prejudicial is as follows:

> If much the greater number of you is for conviction, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one, since it makes no effective impression upon the minds of so many of the others equally as honest, equally as conscientious as their fellow jurors, who bear the same responsibility, serving under the same oath, and having heard the same evidence with, we may assume, the same attention and equal desire to arrive at the truth of the matter.
>
> On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoroughly, thoughtfully, whether they do not have reason to doubt the correctness of their judgment, which is not concurred in by man [sic] of their fellow jurors, and whether they should not distrust the weight and the effort of the evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt.
>
> Remember at all times that no juror is expected to yield his conscientious conviction that he or she may have as to the weight and effect of the evidence, but remember also that after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict if you do so without violence or harm to your individual judgment.

136-37, *quoting* U.S. v. Winn, *supra*, at 416. Judge Murrah writing for the court called attention to the desirability of giving the charge prior to the development of the emergency.

Subsequent decisions have taken the same approach. *See* United States v. Abbadessa, *supra*, and Munroe v. U.S., *supra*, wherein the court said:

> To this date this court has not, as a general rule, condemned the giving of supplemental jury instructions or struck down the giving of the so-called "Allen" type instruction. The court has made a case by case examination to determine whether the taint of coercion was present.

424 F.2d at 246. In *Munroe* the court considered fully the elements to be weighed and said that these should include any colloquy between the judge and the jury foreman, circumstances surrounding the giving of the instruction, and consideration of the American Bar Association Standards on Criminal Justice Relating to Trial by Jury. Significantly the court did not disapprove giving the instruction after the jury had commenced deliberating. United States v. Smith, *supra*, took the same line.

In the present case the circumstances are not shown to have been prejudicial or coercive. The closest it came to this was in subsequent statements of the court telling the jury to take its time and that they could work all day Saturday and also all day Sunday, and advising them that they should bring their personal items such as night clothes and toilet articles on Friday.

We deem it significant, first, that there were no objections registered to the Allen charge or any of the subsequent statements of the court. We conclude that the giving of the charge and the subsequent statements to the jury were not prejudicial and did not constitute plain error.

III

WAS THE EVIDENCE SUFFICIENT?

We conclude that there is ample evidence to support the judgment. There was both direct and circumstantial evidence. Kirkland, an accomplice, testified for the government. His testimony was that Dyba was part of a scheme and it was he who operated the stolen tools. Even if the testimony of this witness had been uncorroborated, it would be, standing alone, legally sufficient. But it is corroborated by the testimony of Sheriff Kinnear and that of John Buchanan. Moreover, there was flight. Dyba was in hiding for two and one-half years. He admitted that he was aware that a warrant had issued for his arrest.

The jury had an opportunity to judge and evaluate his explanation as to why, notwithstanding his knowledge that the warrant was out, he continued in hiding for the long period of time. This fact plus the direct testimony was sufficient.

IV.

WHETHER THE U.S. ATTORNEY WAS GUILTY OF PREJUDICIAL MISCONDUCT IN COMMENTING ON THE FAILURE OF DYBA TO CALL CERTAIN WITNESSES

The important factor here is that there was not a failure of the accused to testify. Hence the comment of the government could not be construed as referring to him. Apart from comments about the accused, the failure of the party in litigation to call witnesses who have knowledge of facts raises an inference that if the witnesses had been called their testimony would have been harmful or injurious to the accused. The validity of such comments has been recognized where the circumstances are proper.[1]

1. *See* United States v. Keller, 512F.2d 182, 186 (3rd Cir. 1975); United States v. Grammer, 513 F.2d 673 (9th Cir. 1975); United States v. Hager, 505 F.2d 737 (8th Cir. 1974); United States v. Thompson, 490 F.2d 1218, 1221 (8th Cir. 1974); United States v. Lipton, 467 F.2d 1161 (2nd Cir. 1972), *cert. denied*, 410 U.S. 927.

It is noteworthy that the trial court cautioned the jury to disregard the comment. In that instruction the jury was reminded that the burden of proof was on the government and that the defendant is not required to produce any evidence.

V.

WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO ORDER DISCLOSURE OF THE INFORMANT'S IDENTITY?

The Supreme Court considered in Roviaro v. United States, 353 U.S. 53 (1957), the question which is now before us. There the Supreme Court held that because of the special circumstances disclosure was required. There is, however, a countervailing factor to be weighed and that is the value to the government of having a free flow of information concerning the violation of laws and the whereabouts of the violators. This was recognized in *Roviaro*. In that opinion the Court said that there was no fixed rule as to justifiable disclosure or refusal to disclose. It is further said that resolving the problem required a balancing of public interest against the individual's right to prepare a defense.

Here the informer did not, as far as we know, testify. In fact, the defendant had only suspicions as to the informant's identity. His belief was that Judy Kirkland, the wife of Prentiss Kirkland, had furnished the information. He argued that possession of this fact would have discredited Kirkland, the principal witness. If it was Kirkland and his wife, the opportunity to discredit would not weigh so heavily since the government was not dependent on the testimony of Kirkland. There was other evidence, both direct and circumstantial. In the light of this, we must determine that the trial court's ruling was proper. *See* United States v. Herbert, 502 F.2d 890 (10th Cir. 1974). *cert. denied*, 420 U.S. 931 (1975); and Garcia v. United States, 373 F.2d 806 (10th Cir. 1967).

Accordingly, the judgment of the district court is affirmed.

No. _____

In The Supreme Court of the United States

_____ TERM, 1977

GEORGE RAYMOND DYBA

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari
to The United States Court of Appeals
For the Tenth Circuit

To the Honorable Warren Berger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by George Raymond Dyba for a writ of certiorari to review a judgement of the United States Court of Appeals for the Tenth Circuit entered in the above case.

I.

OPINION DELIVERED IN COURTS BELOW

The district court did not write an opinion regarding the specific question raised within this petition. The opinion of the Court of Appeals reported in____F.2d____, a copy of which is attached herein.

II.

JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is May 6, 1977. No petition for rehearing was sought in the Tenth Circuit Court of Appeals. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question in *Section 1254(1)* of *Title 28 of the United States Code.*

III. .

QUESTION PRESENTED

The question presented for review is: Did the *Allen* charge and additional comments by the district court to a deadlocked jury in the trial of George Raymond Dyba deny the defendant Dyba a trial by a fair and impartial jury?

IV.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Amendment Six to the United States Constitution, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

V.

STATEMENT OF THE CASE

On May 18, 1973, a federal grand jury in Oklahoma indicted George Raymond Dyba, petitioner. Count One of the two-count indictment charged that on January 29, 1973, Dyba entered a bank in Meeker, Oklahoma, which was insured by the Federal Deposit Insurance Corporation, with the intent to commit in said bank a felony affecting the bank, to-wit: burglary of moneys in the care of the bank, in violation of Title 18, U.S.C. Sec. 2113(a). The indictment also contained a second count alleging that Dyba, on or about the 29th day of January, 1973, at Meeker, Oklahoma, did conceal and retain with intent to convert to his use or gain, stolen property of the United States, having value exceeding $100.00, to-wit: two Motorola handie-talkie radios, in violation of Title 18, U.S.C. Sec. 641.

The F.B.I. failed to apprehend Dyba until September 9, 1975, when Dyba was arrested in his home in Billings, Montana. Thereafter, Dyba was incarcerated, unable to post bond. He pleaded not guilty to both counts contained in the indictment.

Dyba was first brought to trial before the United States District Court for the Western District of Oklahoma on October 23, 1975. That trial ended with a hung jury after several days of deliberation, and a mis-trial was declared.

Dyba underwent a second trial, based upon the same indictment, commencing on December 8, 1975. After several days of deliberation, the jury found the petitioner guilty of Count One and not guilty of Count Two of the indictment.

In the early morning hours of January 29, 1973, a bank in Meeker, Oklahoma was burglarized. Three persons were interrupted in their attempt to burglarize the bank by a County Sheriff, deputies and private citizens. Two of the parties were arrested after a brief chase and were later identified as Prentiss Newton Kirkland and Theodore

Paul "Whitey" Bates. A third man captured by the County Sheriff escaped while the Sheriff was frisking the man for weapons. The man jumped into the open door of the Sheriff's car and drove away with the Sheriff clinging to the side. The Sheriff fell from the moving vehicle into the street, but managed to pull his revolver and fire one shot at the driver before his fall.

Subsequent investigation by various law enforcement agencies failed to disclose the identity of the third burglar. Various known associates of Bates and Kirkland were interviewed by the F.B.I. as suspects. The petitioner was not located by any law enforcement agency until two and one-half years after the burglary.

During both of petitioner's trials, petitioner testified on his own behalf and presented witnesses to support his alibi defense to the prosecution's circumstantial case.

During the petitioner's first trial, neither Kirkland nor Bates, the alleged accomplices, testified on behalf of the plaintiff or defendant. Both Kirkland and Bates were in custody during the time of the first trial. However, during petitioner's second trial, Kirkland testified under a grant of immunity and identified petitioner Dyba as the third man involved in the burglary in Oklahoma.

This case was submitted to the jury in the second trial at 4:15 p.m., December 10, 1975. On that date, the jury deliberated until 5:30 p.m., at which time they recessed for the evening.

Deliberations resumed on December 11, 1975, at approximately 9:00 a.m. At 11:17 a.m., that same date, the Court received a note from the jury, stating essentially that the jury was unable to reach a verdict. At 11:17 a.m. on Thursday morning, December 11, 1975, the trial Court further instructed the jury on their duties. The instruction given was a greatly elaborated version of the so-called *Allen* charge. This supplemental charge given by the Court is found on the transcripts, page 486 through page 493.

At 11:35 a.m., December 11, 1975, the jury retired to the jury room for further deliberations. The jury again sent a note to the Court at 2:40 p.m., December 11, 1975. This note contained a request for the testimony of various witnesses. A reading of this note may be found in the transcripts, page 494, lines 4 through 14. At pages 494 and 495 of the transcripts, the Court elaborates on the reasons that it must decline the jury's request for a reading of various testimony. This elaboration by the Court occasionally tended to border on further instructions to the jury. Examples are: Transcripts, page 495, lines 17 through 20; and Transcripts, page 496, lines 16 through 21.

After the Court's refusal to produce certain portions of testimony, the jury returned to its deliberations. Approximately two hours later, at 4:40 p.m., December 11, 1975, the Court requested that the jury be brought back into the courtroom. The Court then suggested that the jury recess until the following morning. Again, the Court gave further instructions to the jury, including references to the cost of retrying the case, the delay in the work that would be caused by the failure of the jury to reach a verdict the next day. Also, at this time, the Court instructed the jury to bring their tooth brushes, pajamas, and other convenient articles due to the fact that they would be sequestered the following evening (Friday). This discourse by the Court may be found on pages 497 and 498 of the transcripts.

The jury resumed its deliberations between 9:00 and 9:30 a m. on December 12, 1975. At 3:43 p.m., the Foreman of the jury advised the Court that they had arrived at a verdict. Dyba was found guilty of Count One, burglary.

Various portions of the *Allen* charge and other supplemental comments by the trial Court to the jury contain continued reference to the time and expense of retrying this case, that the case must be disposed of, several comparisons between the first case whereby petitioner was tried, and the second case, including a reference to the

fact that Kirkland, the alleged accomplice, did not testify in the first case and that that jury ended with a hung jury, sufficient evidence was presented to the jury so that they might arrive at a verdict, that the same *Allen* charge was given to the jury in the case before which ended in a hung jury, that due to the first hung jury, substantial sums of money have been spent, and that the jury would be sequestered on Friday night if they failed to reach a verdict.

The basis for federal jurisdiction in the Court of first instance is that violations of Title 18, U.S.C. 2113(a) and Title 18, U.S.C. 641 were alleged by indictment.

VI.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF COURT OF APPEALS

The decision of the Tenth Circuit Court of Appeals as to the propriety of the supplemental charge by the trial Court involves an important question of federal law which has not been, but should be, settled by this Court.

The decision of the Tenth Circuit Court of Appeals so far sanctions such a departure from the accepted and usual course of judicial proceedings by the lower court as to call for an exercise of this Court's power of supervision.

The decision of the Tenth Circuit Court of Appeals as to supplemental charges in the present case is in conflict with the decisions of other circuit courts on the same matter. In the First Circuit Court of Appeals, see *U.S. v. Flannery*, 451 F.2d 880 (1971) and *U.S. v. Angiulo*, 485 F.2d 37 (1973).

In the Second Circuit Court of Appeals, see *U.S. v. Domenech*, 476 F.2d 1229 (1973).

In the Third Circuit Court of Appeals, see *U.S. v. Fioravanti*, 412 F.2d 407 (1969).

In the Fourth Circuit Court of Appeals, see *U.S. v. Rogers*, 289 F.2d 433 (1961).

In the Fifth Circuit Court of Appeals, see *U.S. v. Green*, 309 F.2d 852 (1962); *U.S. v. Williams*, 388 F.2d 532; *U.S. v. Duke*, 492 F.2d 693 (1974); *U.S. v. Amaya*, 509 F.2d 8 (1975); *U.S. v. Bailey*, 468 F.2d 652 (1972); and *Thaggard v. U.S.*, 354 F.2d 735 (1965).

The decision of the Tenth Circuit Court of Appeals as to the *Allen* charge sets a federal precedent that is probably in conflict with applicable decisions of this Court in *Allen v. U.S.*, 164 U.S. 492, 41 L.Ed. 528 (1896) and *Jenkins v. U.S.*, 380 U.S. 445, 13 L.Ed.2d 957, 85 S.Ct. 1054.

ARGUMENT

The petitioner alleges that both the timing and content of the supplemental charges given by the trial Court in petitioner's case were improper. One of the more common reasons for looking upon the *Allen* charge with disfavor is that this type of supplemental charge given to a deadlocked jury unfavorably sways and coerces the jury into unanimous decision. The American Bar Association's Project on Standards for Criminal Justice relating to trial by jury, Part V, Jury Deliberations and Verdict, Sec. 5.4(a) and (b) set forth a recommended *Allen* charge and the appropriate time for giving such charge to a jury. The standards specifically state that an *Allen* charge should not be given to a jury which has been unable to agree after deliberations.

The trial Court instructed the jury after they were deadlocked that the case must be decided unanimously. During the *Allen* instruction given on December 11, 1975, the Court stated as follows:

> "Both the defense and the prosecution are deeply concerned about your inability to arrive at a verdict here or in the future. If you should fail to agree upon a verdict, the case is

left open and undecided completely. It's as though nothing had been done.

Like all cases, it must be disposed of. These cases cannot just go away. They must be disposed of." *Transcripts*, page 487, lines 7 through 13.

"I see no reason why, from all the evidence you have heard, that you cannot arrive at a verdict in this case." *Transcripts*, page 492, lines 5 and 6.

"But we've got all day today, we've got all day tomorrow, we can work on Saturday, probably could take a recess on Sunday; but this case must be decided if at all possible, and I say if at all possible, by this jury. It has been tried once." *Transcripts*, page 496, lines 16 through 20.

"The Court would suggest to you that you might come prepared to spend the night. The Court may decide to sequester you tomorrow night, which means to keep you in a hotel someplace, *keep you together until we reach a verdict in this case*. I am not saying we will (sequester you), but it's altogether possible that we will. As you know, this case is on for the second time; and it seems to me that it's not so difficult, or the evidence so varied that the jury can't some way, some how, arrive at a verdict." *Transcripts*, page 498, lines 4 through 12. (Emphasis supplied.)

Language similar to that above was specifically disapproved in *Huffman v. U.S.*, 297 F.2d 754 (5th Cir. 1962); *U.S. v. Duke*, 492 F.2d 693 (5th Cir. 1974); *U.S. v. Flannery*, 451 F.2d 880 (1st Cir. 1971). This same type language was also held to be reversible error by the United States Supreme Court in *Jenkins v. U.S.*, 380 U.S. 455, 13 L.Ed.2d 957, 85 S.Ct. 1054.

Various statements made by the Court in the supplemental charge to the jury were independently coercive. A prime example of coercive statements during the charge is the constant reference to expense of the present trial, as well as the expense of the prior trial of the

petitioner. In regard to the cost of the case, a consideration which is not included in the supplemental charge suggested by the American Bar Association, the trial Court stated as follows:

> "The trial has been expensive as you well know and can observe from the witnesses that have been called, the distances which they have had to travel to come an give you their information. This is expensive. The effort on the part of both parties has been expensive and time consuming; and it amounts to a lot of work as well as a lot of money." *Transcripts*, page 487, lines 1 through 6.

> "There appears to me no reason to believe another jury, as was in the case before, would cost any less than it cost to try this case, than it cost to try it before..." *Transcripts*, page 487, lines 14 through 16.

> "I told the jury before when this case was tried and we had a hung jury the same thing I am telling you now. They didn't get together, and it cost substantial sums of money to have people come distances miles and miles away, pay their hotel bills, their living expenses while they are waiting to be called as witnesses, and then go back home." *Transcripts*, page 496, lines 15 through 20.

> "...It has been tried once. People have gone to all the expense they have gone to, the time. the work, the trouble." *Transcripts*, page 496, lines 19 through 21.

> "As I said before, the cost of retrying it, it's expense, and the delay and the work -- it's a job that the jury took when you took the case; so if you will, it is my suggestion that you be prepared to be sequestered at night, tomorrow night." *Transcripts*, page 498, lines 13 through 17.

The expense of the trial or of any past trial for the same criminal defendant is not a proper consideration for a jury in a criminal case. Reference to such expense was clearly made in a coercive manner to encourage the jury to reach a unanimous verdict.

The argument in regard to expense becomes even stronger when viewed in light of various other improper statements within the supplemental charges. The Court placed further pressure on the jury by stating repeatedly that the same case had been tried before and that the prior jury was unable to reach a verdict, causing great expense to the government. Clear implication in the repeated reference to the prior hung jury is that the present jury should not do what the prior jury had done, that is, fail to reach a unanimous verdict. In regard to the prior trial and the resulting hung jury, the Court stated as follows:

> "There appears to me no reason to believe another jury, as was in the case before, would cost any less than it cost to try this case, than it cost to try it before..." *Transcripts*, page 487, lines 14 through 16.

"As you know, this time there was an additional witness, that wasn't a witness before, and that is Mr. Kirkland. He had never testified before. The jury before didn't have his testimony for their consideration; but you, this jury, did have this testimony, for what it's worth." *Transcripts*, page 487, lines 20 through 24.

"The Court feels that this case has been tried once before..." *Transcripts*, page 491, lines 20 through 21.

"I told the jury before when this case was tried and we had a hung jury the same thing I am telling you now. They didn't get together, and it cost substantial sums of money to have people come distances miles and miles away, pay their hotel bills, their living expenses while they are waiting to be called as witnesses and then go back home." *Transcripts*, page 492, lines 15 through 20.

"It has been tried once." *Transcripts*, page 496, lines 19 through 20.

The inference of coercion by the Court during its supplemental charge is strengthened by the fact that during the prior trial the jury could not return a verdict upon the trial of the same cause, even after the jury had received a somewhat milder *Allen* charge. See, *U.S. v. Bailey*, 468 F.2d 652 (5th Cir. 1972) and *Thaggard v. U.S.*, 354 F.2d 735 (5th Cir. 1965).

Petitioner contends that the comparison between evidence presented at the first trial and that presented at the second trial by the trial Court judge to the jury in the second trial was absolute error. This allegation is made specifically toward the comment by the Court to the jury as follows:

> "As you know, this time there was an additional witness that wasn't a witness before, and that is Mr. Kirkland. He had never testified before. The jury before didn't have his testimony for their consideration; but you, this jury, did have this testimony, for what it's worth." *Transcripts*, page 487, lines 20 through 24.

A reading of the transcript from the first trial and the second trial will indicate that there was little difference between the two trials in regard to testimony submitted. The only substantial difference between the first trial and the second trial was the testimony of an alleged accomplice, Kirkland. Without a doubt, Kirkland's testimony was the most damaging to petitioner.

The petitioner believes that his case was absolutely prejudiced by the Court's statement in regard to Kirkland's testimony within the supplemental charge. First of all, the Court stated, repeatedly, that the case had been tried before, and that the result was a hung jury. See citations above. Secondly, the Court compared the evidence given in the second trial with the evidence submitted at the first trial. On page 487 of *Transcripts*, lines 14 through 16, the Court informed the jury that the same case had been tried before by another jury. On lines 17

through 19 of the same page, the Court informed the jury that if the case were to be tried again, in other words, for a third time, neither side would be able to submit any better evidence. On lines 20 through 24 of the same page, the Court made the reference to Kirkland's testimony and the fact that the prior hung jury did not have such testimony of the accomplice for its consideration. The intent of the Court was obvious.

Subsequent to the Court's reference to Kirkland's testimony, the jury submitted a note to the Court, the first words of which are found at *Transcripts*, page 494, lines 4 through 6 and read as follows:

> "(reading) 'Dear sir: The members of the jury respectfully request to hear the transcript of the testimony, following testimony, reread, (1) Kirkland's testimony in full;..." *Transcripts*, page 494, lines 4 through 6.

Petitioner also believes the trial Court erred when stating that the facts submitted to them in the case did not vary to such an extent that they should not be able to reach a unanimous verdict. A reading of the transcripts will indicate that the prosecution contended that on January 29, 1973, petitioner was burglarizing a bank in Meeker, Oklahoma. The defense presented facts through several witnesses that the petitioner on January 29, 1973,, was in Billings, Montana conducting business and family affairs.

On page 492, lines 5 and 6, *Transcripts*, the Court stated as follows:

> "I see no reason why, from all the evidence you have heard, that you cannot arrive at a verdict in this case." *Transcripts*, page 492, lines 5 and 6.

> "As you know, this case is on for the second time; and it seems to me that it's not so difficult, or the evidence so varied that the jury can't some way, some how arrive at a verdict." *Transcripts*, page 498, lines 9 through 12.

The facts presented to the jury varied widely and the caliber of the petitioner's alibi defense should have been considered seriously by the jury.

Petitioner claims that the instruction to the jury by the Court regarding sequestering the jury was used as a tool of coercion in order that they might reach a verdict. The language used by the Court in the present case reads as follows:

> "The Court would suggest to you that you might come prepared to spend the night. The Court may decide to sequester you tomorrow night, which means to keep you in a hotel someplace, keep you together until we reach a verdict in this case. I am not saying we will, but it's altogether possible that we will. As you know, this case is on for the second time; and it seems to me that it's not so difficult, or the evidence so varied that the jury can't some way, some how arrive at a verdict.
>
> As I said before, the cost of retrying it, it's expensive, and the delay and the work -- it's a job that the jury took when you took the case; so if you will, it is my suggestion that you be prepared to be sequestered at night, tomorrow night.
>
> I would do it tonight but for the fact that no one has their toothbrush or their pajamas or other things to be convenient. All of these costs, of course, will be paid by the Government." *Transcripts*, page 498, lines 4 through 21.

Compare the above language to the language used in *United States v. Amaya*, 509 F.2d 8, at page 11 (5th Cir. 1975), where the Fifth Circuit Court of Appeals held an *Allen* charge invalid.

In the present case, the language indicating that the jury would be sequestered is intermingled with language stating that the case is not so difficult, at least in the Court's eyes, where the evidence so varied that the jury can't reach a verdict. Also, the Court again refers to the expense, the delay and the work that would be caused by retrying the

case. In the same sentence, after the jury is warned of the expense, delay and work, the Court suggests that the jury be prepared to be sequestered the next evening. The language in regard to sequestering of the jury is a very thinly veiled threat.

Supplemental charges in the present case provide a combination of nearly every type of supplemental charge which has been declared improper by various courts throughout the United States. The charge is extremely coercive in content and was given at an inappropriate time, when the jury was deadlocked. This argument is made even stronger by the fact that the same case had been tried at a prior time with a resultant hung jury. Some of the improprieties contained within the supplemental charges have been quoted above. However, several more improper statements were made during the course of the Court's supplemental comments to the jury. Petitioner alleges that nearly every aspect of the supplemental charges prevented a fair trial by an impartial jury.

VII.

CONCLUSION

Wherefore, George Raymond Dyba, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above entitled case.

Respectfully submitted this 31st day of May, 1977.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was duly served by United States mail upon the attorney for the United States as follows:

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No. 76-1731

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. iv-xiii) is reported at 554 F. 2d 417.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1977. The petition for a writ of certiorari was filed on June 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge coerced the jury by giving a modified *Allen* charge in response to the jury's statement that it was deadlocked after three and one-half hours of deliberation, and by subsequent remarks following a

jury request and when releasing the jury for overnight recess.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of burglary of a federally-insured bank, in violation of 18 U.S.C. 2113(a).[1] He was sentenced to 15 years' imprisonment and a $2,500 fine. The court of appeals affirmed (Pet. iv-xiii).

1. The evidence, summarized in the court of appeals' opinion, showed that petitioner and three confederates burglarized a bank in Meeker, Oklahoma, during the early morning hours of January 29, 1973. On the evening before the robbery, petitioner flew to Oklahoma City where he joined Prentiss Kirkland, Paul Bates, and Robert Krogness. The group then drove to Meeker (Tr. 262-264, 275-278). While Krogness waited outside of town in a car, petitioner, Kirkland, and Bates broke into a garage near the bank and stole oxygen tanks and an acetylene torch, which they carried to the bank (Tr. 266, 278-279). Petitioner and Kirkland then entered the bank, while Bates positioned himself on the roof; communications among the three men were maintained by two-way radios. Petitioner cut a hole in the top of the safe with the acetylene torch and removed the money (Tr. 265-267).

During the burglary, a barber who was in his shop across the street from the bank observed petitioner and

[1]Petitioner was acquitted on a second count charging theft of government property, in violation of 18 U.S.C. 641. A prior trial for the same offenses had resulted in a mistrial when the jury was unable to reach a verdict.

one associate in front of the bank and later saw Bates on the rooftop (Tr. 28-29). The barber notified another Meeker resident, who summoned the county sheriff and other law enforcement officers; they arrived at the bank while the burglary was in progress (Tr. 29-30, 75-76). Following police gunfire, petitioner and his two accomplices were apprehended as they fled from the bank (Tr. 42-44, 76-77, 83-84). While petitioner was being searched for weapons by the county sheriff, he jumped into the sheriff's automobile and drove away. The sheriff, clinging to the side of the automobile, fired one shot at petitioner before being thrown to the ground as the car turned a corner at high speed (Tr. 47-50). When the sheriff's car was recovered outside of town several hours later, a bullet was removed from the windshield and three napkins soaked in blood of petitioner's blood type were recovered from the interior of the car (Tr. 100-102, 167-171). Petitioner was apprehended over two and one-half years later in Billings, Montana (Tr. 175-178).

Kirkland identified petitioner as the burglar who had escaped in the sheriff's car. Both the sheriff and a private citizen who had viewed the third burglar as he was being ing frisked testified that petitioner resembled the burglar (Tr. 50, 65-66).

2. After deliberating for approximately an hour on the day it received the case for submission and for over two hours the following day, the jury informed the court that it was deadlocked and desired further assistance. The court responded by reading a modified *Allen*[2] instruction (Tr. 486-493). Petitioner's counsel did not object to the charge (Tr. 493). Three hours later the

[2]See *Allen* v. *United States*, 164 U.S. 492.

jury asked that the testimony of certain witnesses be re-read. The court refused this request and added, *inter alia*, the following statement (Tr. 496):

> But we've got all day today, we've got all day tomorrow, we can work on Saturday, probably could take a recess on Sunday; but this case must be decided if at all possible, and I say if at all possible, by this jury. It has been tried once. People have gone to all the expense they have gone to, the time, the work, the trouble.

Defense counsel did not object to the court's comment (Tr. 497). Two hours later, when it released the jury for the day at 4:40 p.m., the court mentioned the possibility of sequestering the jury if it had not reached a verdict after the next day's deliberation (Tr. 498).[3] Again defense counsel did not object to the trial court's remark (Tr. 499).

ARGUMENT

Petitioner contends that the trial judge erred in giving a modified *Allen* charge and that the court's additional

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[3]The court's remarks were as follows (Tr. 498):

> The Court would suggest to you that you might come prepared to spend the night. The Court may decide to sequester you tomorrow night, which means to keep you in a hotel some place, keep you together until we reach a verdict in this case. I am not saying we will, but it's altogether possible that we will. As you know, this case is on for the second time; and it seems to me that it's not so difficult, or the evidence so varied that the jury can't some way, some how arrive at a verdict.
>
> As I said before, the cost of retrying it, it's expensive, and the delay, and the work—it's a job that the jury took when you took the case; so if you will, it is my suggestion that you be prepared to be sequestrated at night, tomorrow night.

remarks coerced the jury by conveying the false impression that it had an absolute duty to arrive at a verdict (Pet. 7-8). In particular, petitioner challenges the trial judge's references to the expense of the instant trial (Pet. 8-9), to the fact that a previous jury had also been unable to reach a verdict on the same charges (Pet. 10), to the fact that the jury had the testimony of a witness who had not testified at the earlier trial (Pet. 11-12), and to the possibility of sequestering the jury if it did not reach a verdict after an additional day of deliberation (Pet. 13-14).

Since petitioner did not object at trial either to any portion of the *Allen* instruction or to the court's related comments, he may not assign these matters as error on appeal unless they constitute plain error. At the time the instruction was given, petitioner stood to gain as much as he did to lose from it. No one knew how the jurors were divided, and petitioner's failure to object may well have been a strategic decision, made in the hope that, if the instruction did have a coercive impact, it would benefit him. By foregoing an objection he preserved the possibility of this benefit; he thereby waived the right to raise the matter on appeal. See *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977 ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (slip op. 8).).

In any event, as the court of appeals correctly concluded (Pet. xi), the supplemental charge and subsequent comments "were not prejudicial and did not constitute plain error." To determine whether the trial court's *Allen* charge or subsequent comments coerced the jury, both the trial court's language and the facts and circumstances forming the context for the court's remarks must be examined. *Jenkins* v. *United States*, 380 U.S. 445; *United States* v.

Cheramie, 520 F. 2d 325, 328-332 (C.A. 5); *United States* v. *Winn*, 411 F. 2d 415, 416-417 (C.A. 10), certiorari denied, 396 U.S. 919. We submit that such an examination shows that the *Allen* charge and subsequent comments did not coerce the jury.

The court gave the supplemental charge after the jury had deliberated for more than three hours without a verdict and had specifically requested guidance from the court. In its charge, the court, while stating *inter alia* that this case, "[l]ike all cases, * * * must be disposed of" and that there was "no reason to believe [it] would ever be submitted" to a jury upon additional evidence or to more competent jurors (Tr. 487-488), balanced this language by cautioning—as it had in its original charge (Tr. 479)—that the verdict must reflect the decision of each individual member of the jury and that the jury was to reach a verdict only if each juror could do so without harm to his own individual judgment (Tr. 488, 490). The court further emphasized that each juror, majority as well as minority, should reexamine his views in light of the differing opinions of fellow jurors (Tr. 489-490), and it underscored—as it had earlier (Tr. 466, 467, 472, 475)—the government's burden of proving guilt beyond a reasonable doubt (Tr. 490-491). These instructions, while reminding the jury of its task to reach a verdict if possible, were ample protection against the danger that it would perceive the court's charge as requiring a guilty verdict. See *United States* v. *Cheramie, supra*, 520 F. 2d at 331; *Munroe* v. *United States*, 424 F. 2d 243, 245-247 (C.A. 10); *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1).

The court's later suggestion that continued inability of the jury to reach a verdict might necessitate sequestration cannot fairly be interpreted as a coercive threat

that the jury would be exposed to exhausting deliberations until it reached a verdict. The court's actions had made it plain that it intended the periods of deliberation to be reasonable; it released the jury at 5:33 p.m. on the first day of deliberation and at approximately 4:40 p.m. on the second day (Tr. 484, 497-499). Moreover, the court made the comment in question less than two hours after having assured the jury that it could take several more days to evaluate the evidence, would probably be allowed to recess on Sunday if a verdict had not been reached by then, and could "be as leisurely in [its] deliberations as the occasion may require, and * * * [should] take all the time which [it] may feel reasonably necessary" (Tr. 491, 495). These instructions belie petitioner's claim that the court intended to rush the jurors into an agreement.

Nor were the court's other comments, viewed in the context of the cautionary instructions noted above, so prejudicial as to warrant reversal in the absence of petitioner's objection. The court, although mentioning that the jury—unlike the jury at petitioner's previous trial—had had the benefit of the testimony of Kirkland, expressed no opinion as to the nature or credibility of Kirkland's testimony, stating merely that the jury should consider it "for what it's worth" (Tr. 487). Similarly, the court's remarks concerning the cost of the trial and of petitioner's previous trial emphasized that this was a burden both sides had to bear (Tr. 487) and told the jury no more than what it undoubtedly already knew—that criminal litigation is expensive to both the government and the defendant. In short, these remarks did not lead the jury to disregard the court's prior instructions to deliberate slowly and thoroughly and to arrive at a verdict only if each juror could conscientiously do so.

Finally, the timing and nature of the verdict confirms our view that the court's comments did not prejudice petitioner's rights. Following its final communication from the court, the jury was allowed to separate and recess overnight. Upon reconvening the next morning, the jury did not rush to agreement, but returned its verdict after several additional hours of deliberation (Tr. 500). Moreover, the jury's acquittal of petitioner on one of two counts of the indictment reflects substantial discussion among the jurors on each aspect of the case rather than hasty and coerced agreement.

In sum, the trial court's supplemental charge and subsequent comments to the jury did not pressure minority jurors to abandon their conscientiously held views or suggest that the jurors had an absolute duty to decide the case. The instructions were not calculated to coerce the jury into agreeing on a verdict and did not constitute plain error affecting petitioner's substantial rights. Rule 52(b), Fed. R. Crim. P.[4]

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[4]Petitioner suggests that this Court should resolve an apparent conflict among the courts of appeals regarding the validity of the traditional *Allen* charge. Four courts of appeals, in the exercise of their supervisory powers, have held that the *Allen* charge should not be given unless substantially modified. See *United States* v. *Angiulo*, *supra*; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.); *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017. (The Tenth Circuit continues to approve the *Allen* charge with minimal modification. *United States* v. *Smith*, 521 F. 2d 374, 376-377 (C.A. 10); *Munroe* v. *United States*, *supra*, 424 F. 2d at 245-247.) But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict. The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction, and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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